Sheet Sheet Metal Workers Local Union No. 20, a/w Sheet Metal Workers' International Association, AFL–CIO *and* Baylor Heating and Air Conditioning, Inc. Case 25–CB–6256

January 22, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On September 15, 1989, Administrative Law Judge Stephen J. Gross issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent Union filed cross-exceptions and a brief both in support of its cross-exceptions and in opposition to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

I. FACTUAL FINDINGS

In August 1984, Baylor Heating and Air Conditioning, Inc., the Employer, voluntarily executed a collective-bargaining agreement (the 1984 agreement) identical to the existing agreement between Sheet Metal Workers Local Union No. 20, the Respondent, and the Sheet Metal Contractors Association of Evansville, Inc. (the Association). The contract between the Employer and the Respondent, a prehire agreement lawful under Section 8(f), provided that it would be effective from May 1, 1984, through April 30, 1987. The Employer was not a member of the Association at the time it agreed to adopt the agreement, and it did not become a member thereafter.

In early 1987,[1] the Employer notified the Respondent that it would not agree to a new collective-bargaining agreement. At about the same time, the Respondent notified the Employer of its desire to make changes in the terms of the expiring contract to become operative in their renewal agreement. Thereafter, prior to April 30, the Respondent expressed to the Employer its willingness to negotiate for an agreement to succeed the 1984 agreement. The Employer declined, and maintained its position that it would not sign another contract when the current one expired. The Respondent filed an 8(a)(5) charge against the Employer with the Board. On April 15, the Acting Regional Director for Region 25 dismissed the charge, citing the Employer's ability to repudiate its 8(f) relationship with the Respondent at contract expiration under *John Deklewa & Sons, Inc*., 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 109 S.Ct. 222 (1988).

On May 1, the Employer withdrew recognition of the Respondent as the collective-bargaining representative of its unit employees. In late May, the Respondent initiated the contractual interest arbitration process pursuant to article X, section 8 of the Agreement,[2] requesting the National Joint Adjustment Board (NJAB) to resolve its dispute with the Employer.[3] The Respondent proposed to NJAB that the Employer be bound to a new agreement essentially the same as the 1984 contract; the Respondent's submission thus included the interest arbitration provisions of the preceding contract. The Respondent also proposed an itemized list of changes in the language of various articles of the agreement; one of these proposed changes was the replacement of the term ''Local Contractor's Association'' with the term ''employer(s) representatives'' in the first paragraph of subsection (a) of article X, section 8. Although given notice, the Employer de-

[1] All subsequent dates are in 1987 unless otherwise noted.

[2] Art. X, sec. 8, in relevant part, is as follows:

Section 8. In addition to the settlement of grievances arising out of interpretation or enforcement of this agreement as set forth in the preceding sections of this Article, any controversy or dispute arising out of the failure of the parties to negotiate a renewal of this Agreement shall be settled as hereinafter provided:

(a) Should the negotiations for renewal of this Agreement become deadlocked in the opinion of the Local Union or of the Local Contractor's Association, or both, notice to that effect shall be given to the National Joint Adjustment Board.

If the Co-Chairmen of the National Joint Adjustment Board believe the dispute might be adjusted without going to final hearing before the National Joint Adjustment Board, each will then designate a panel representative who shall proceed to the locale where the dispute exists as soon as convenient, attempt to conciliate the differences between the parties and bring about a mutually acceptable agreement. If such panel representatives or either of them conclude that they cannot resolve the dispute, the parties thereto and the Co-Chairmen of the National Joint Adjustment Board shall be promptly so notified without recommendation from the panel representatives. Should the Co-Chairmen of the National Joint Adjustment Board fail or decline to appoint a panel member or should notice of failure of the panel representatives to resolve the dispute be given, the parties shall promptly be notified so that either party may submit the dispute to the National Joint Adjustment Board.

The dispute shall be submitted to the National Joint Adjustment Board pursuant to the rules as established and modified from time to time by the National Joint Adjustment Board. The unanimous decision of said Board shall be final and binding upon the parties, reduced to writing, signed and mailed to the parties as soon as possible after the decision has been reached. There shall be no cessation of work by strike or lockout unless and until said Board fails to reach a unanimous decision and the parties have received written notification of its failure.

(b) Any application to the National Joint Adjustment Board shall be upon forms prepared for that purpose subject to any changes which may be decided by the Board from time to time. The representatives of the parties who appear at the hearing will be given the opportunity to present oral argument and to answer any questions raised by members of the Board. Any briefs filed by either party including copies of pertinent exhibits shall also be exchanged between the parties and filed with the National Joint Adjustment Board at least twenty-four (24) hours in advance of the hearing.

[3] NJAB is made up of representatives of the Sheet Metal Workers International Association and the Sheet Metal and Air Conditioning Contractors National Association (SMACNA). Although the Association is a member of SMACNA, the Employer is not.

clined the opportunity to participate in the NJAB proceeding.

On June 24, NJAB ordered the Employer to execute a 4-year agreement retroactive to June 1, incorporating the contractual terms and conditions NJAB had recently imposed in a new 4-year agreement between the Respondent and the Association. The new contract included interest arbitration provisions, with significant limitations.[4] After the Employer refused to execute the new agreement, the Respondent in October sought enforcement of the NJAB award in Federal district court. The Respondent's effort was successful, and the Employer's appeal was denied by the court of appeals.[5] In November, the Employer filed an unfair labor practice charge, and in September 1988 the complaint in the instant case issued, alleging that the Respondent violated Section 8(b)(1)(B), first, by seeking to bind the Employer to a new collective-bargaining agreement through its NJAB submission although the Employer had lawfully repudiated its 8(f) relationship with the Respondent and, second, by seeking enforcement of the NJAB award in Federal court.

II. THE ADMINISTRATIVE LAW JUDGE'S DECISION

In a decision issued prior to our Decision and Order in *Electrical Workers IBEW Local 113 (Collier Electric)*, 296 NLRB 1095 (1989), the judge, on the basis of a stipulated record, held that, insofar as the Respondent's submission to NJAB and subsequent court enforcement action sought only to enforce the interest arbitration clause in the 1984–1987 contract, the Respondent did not violate the Act, but that insofar as the Respondent's submission to NJAB sought to impose an interest arbitration provision on the Employer in the new contract, it violated Section 8(b)(1)(B) of the Act.

In finding no violation as to the basic NJAB submission and court action, the judge recognized that the Employer had no representative on the NJAB panel that resolved the terms of the new collective-bargaining agreement. He concluded, however, that so long as the submission to NJAB and the related court action had a reasonable basis—i.e., so long as the Respondent could reasonably believe that the interest arbitration provisions of the 1984–1987 contract (to which the Employer had agreed) governed negotiations for a new agreement—then there was no unlawful coercion or restraint within the meaning of Section 8(b)(1)(B). Relying almost exclusively on the Respondent's success at the trial and appellate levels in its lawsuit, the judge concluded that the Respondent acted reasonably in attempting to bind the Employer to a new agreement through enforcement of the interest arbitration clause, notwithstanding the right enjoyed by a construction industry employer under *John Deklewa & Sons*, supra, to repudiate a collective-bargaining relationship on the expiration of an 8(f) prehire agreement.

The judge found unlawful the Respondent's inclusion of an interest arbitration clause in its submission to NJAB because this constituted attempting to force a nonconsenting employer to have disputes over future contract negotiations determined by a body in which it had no representation. The judge found that the Respondent could not reasonably have concluded this was lawful, because seeking to impose an interest arbitration clause through interest arbitration was unlawful under Board precedent at the time the Respondent acted. The judge noted that both the district court and the appellate court expressed the same view concerning the unlawfulness of such a clause.[6]

Although the judge was doubtful whether *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), applied to interest arbitration proceedings, he concluded that, in any event, his holdings were consistent with that case. In this regard, he noted that the Respondent had prevailed in court on its basic claim that a new contract could be imposed through interest arbitration and that the Respondent's apparent view that a new interest arbitration clause could be included in that contract was rejected by those courts.

III. ANALYSIS

For the following reasons, we affirm the judge's dismissal but reverse his finding of a violation.

In *Collier*, supra, the Board addressed the question whether a union violates the Act by submitting unresolved bargaining issues to interest arbitration pursuant to a multiemployer contract when there has been a timely withdrawal from the employer association by the employer with whom the union is negotiating. In the instant case, the Employer was never a member of the Association; rather, it executed a collective-bargaining agreement identical to the Association's agreement as an independent entity. In our view, the *Collier* analytical framework is no less applicable to an inde-

[4] NJAB's order referred to art. X, sec. 8 as ''modified to those instances when parties both agree.'' The order also stated:

> It is not the intent of the NJAB to impose any non-mandatory subjects of bargaining upon an unwilling party. In the event the National Labor Relations Board or any court having jurisdiction over the matter determines that any provision of the agreement imposed by the NJAB herein is a non-mandatory subject of bargaining to which a party objected, the provision will be deleted, and the parties, in that event are directed to enter into negotiations to replace the deleted provision with one that is a mandatory subject of bargaining. In the event the parties cannot agree on a replacement for the non-mandatory provision, the NJAB retains jurisdiction to resolve that issue.

[5] *Sheet Metal Workers Local 20 v. Baylor Heating*, 688 F.Supp. 462 (S.D.Ind. 1988), affd. 877 F.2d 547 (7th Cir. 1989).

[6] As set forth in fn. 4, supra, NJAB limited the nature of the interest arbitration provisions in the new contract it imposed on the parties. To the extent that NJAB's modification of the provisions may have been ambiguous, the district court and the court of appeals made clear that the award was not enforceable with regard to a new interest arbitration procedure imposed against the Employer's will. See 688 F.Supp. at 473–474; 877 F.2d at 555–556. Thus, the award ''does not saddle the parties with a perpetual cycle of binding interest arbitration.'' *Collier*, supra at fn. 9.

pendent signatory to a previously negotiated multiemployer agreement than to an employer who has timely withdrawn from the employer association after the agreement has been negotiated. The Employer's execution of the 1984 contract clearly represents its general assent to the terms and conditions negotiated between the Respondent and the Association and embodied in the agreement.

Under *Collier*, the Board considers whether there is a reasonable basis in fact and law for a union's submission of unresolved bargaining issues to interest arbitration. If such a basis exists, the union will be free to invoke its contract rights, including pursuit of a court action to enforce the resulting agreement, without violating the Act. If, on the other hand, the agreement does not even arguably bind the employer to the interest arbitration provisions, then the union's submission of unresolved bargaining issues to interest arbitration would constitute unfair labor practices with respect to coercing the employer in the selection of its collective-bargaining representative.

Collier emphasized, however, that the presence of an interest arbitration clause in a collective-bargaining agreement does not relieve employers and unions of their responsibilities to engage in good-faith bargaining, and on proper invocation of its jurisdiction the Board will review the bargaining for a renewal agreement to ensure that the parties have bargained in good faith prior to the submission of any unresolved issues to interest arbitration.[7]

In analyzing the instant case, we note at the outset that by virtue of the Employer's execution of the 1984 agreement, there can be no serious dispute that it, like the Respondent, is a ''party'' to its contract. See *C.E.K. Industrial Mechanical Contractors*, 295 NLRB 635 (1989), enfd. docket No. 89–2008 (1st Cir. 1990). We also note that there is no language in the agreement explicitly stating that an employer executing the agreement independent of the Association is not bound by the contract's interest arbitration provisions.

Recently, in *Sheet Metal Workers Local 54 (Texas Sheet)*, 297 NLRB 672 (1990), and *Sheet Metal Workers Local 283 (Conditioned Air)*, 297 NLRB 658 (1990), we applied the *Collier* framework with regard to interest arbitration provisions materially identical to the article X, section 8 provisions in the instant case. As stated above, the Employer's status here is not significantly different for application of *Collier* than that of individual employers who have withdrawn from the employer association—the situation in both *Texas Sheet* and *Conditioned Air*. Thus, we find the analyses of the article X, section 8 language in those two cases controlling here. See *Texas Sheet*, supra at 677–678; *Conditioned Air*, supra at 650. Accordingly, the frequent references in article X, section 8 of the 1984 agreement, see footnote 2, supra, to the ''parties'' and their rights and obligations under the interest arbitration process establish, arguably, that the Employer, as a party to its collective-bargaining agreement, is covered by the interest arbitration provisions.

We recognize that the collective-bargaining agreement here is an 8(f) agreement and that the rights and obligations of parties with respect to such agreements are governed by our decision in *Deklewa*, supra; we see nothing in *Deklewa*, however, that mandates a change in the result here.

Deklewa established new principles designed to provide greater stability in the construction industry by precluding parties from unilaterally repudiating their voluntary agreements and to enhance employee free choice by insuring that such voluntary agreements shall not be a bar to petitions filed pursuant to Section 9(c) or (e). *Deklewa* thus requires the parties to an 8(f) agreement to comply with the agreement unless the employees vote, in a Board-conducted election, to reject or change their bargaining representative. *Deklewa* also permits either party to repudiate the 8(f) relationship on the expiration of the agreement. We see nothing in these principles to prevent an employer and a union from voluntarily agreeing to interest arbitration in the prehire context.

The Board has found that *Deklewa* does not preclude a finding that an 8(f) agreement may, in appropriate circumstances, automatically renew. *C.E.K. Industrial Mechanical Contractors*, supra, at 636 fn. 4. Similarly, we find that it does not preclude the inclusion of an interest arbitration provision. Like a provision for automatic renewal, an interest arbitration provision contemplates a renewal of the agreement. It differs principally by leaving open the terms and prescribing a means of resolving disputes arising from the failure to negotiate the renewal.

Here, the interest arbitration clause requires submission to NJAB following any ''failure of the parties to negotiate a renewal of this Agreement.'' Thus, the clause, at least arguably, binds the Employer to a renewal of the agreement and to the NJAB resolution of disputes concerning that renewal. In these circumstances, it may be argued that the parties have agreed to extend their voluntary contractual relationship beyond the expiration date and that the *Deklewa* privilege to repudiate had not yet been triggered at the time of the NJAB submission.[8]

[7] Unlike *Collier*, the complaint in the instant case does not allege a violation of Sec. 8(b)(3). In addition, this case differs from *Collier* in that the collective-bargaining agreement containing the interest arbitration provisions is an 8(f) agreement. Because we find, infra, that there is a reasonable basis in fact and law for the Respondent's submission of unresolved bargaining issues to interest arbitration, we find it unnecessary to address the question of whether a violation of Sec. 8(b)(1)(B) would have been established here if the 8(f) agreement did not even arguably bind the Employer to the interest arbitration provisions.

[8] The Acting Regional Director's dismissal of the Respondent's 8(a)(5) charge on April 15 in reliance on the Employer's *Deklewa* privilege is not dis-

We therefore find that the interest arbitration provisions of the parties' contract are arguably binding on the Employer and, accordingly, that the Respondent's submission of the dispute to NJAB was supported by a reasonable basis in fact and law.[9] Accordingly, we adopt the judge's conclusions that the Respondent did not violate Section 8(b)(1)(B) by its submission of the dispute to NJAB and by its subsequent effort to enforce NJAB's award in Federal court. *Collier*, supra at 1098.[10]

We do not agree, however, with the judge's finding that the Respondent violated Section 8(b)(1)(B) to the extent that its NJAB submission included interest arbitration provisions in the prospective collective-bargaining agreement. The decisions the judge relied on in support of his determination are simply inapposite in light of the particular facts of this case. Thus, in *Sheet Metal Workers Local 59 (Employers Assn.)*, 227 NLRB 520 (1976), and in *Sheet Metal Workers Local 263 (Sheet Metal Contractors)*, 272 NLRB 43 (1984), the critical factor supporting the Board's 8(b)(1)(B) finding was the union's coercive insistence in collective-bargaining negotiations on inclusion of an interest arbitration clause in any new agreement.[11]

In the instant case, no negotiations took place between the parties, and there was no specific proposal made to the Employer or discussion between the parties concerning interest arbitration provisions in a new agreement. Thus, there is no factual basis here for a finding of insistence to impasse on such a clause. Instead, in light of the Employer's refusal to negotiate and its withdrawal of recognition, the Respondent submitted to NJAB a proposal consisting essentially of the 1984 collective-bargaining agreement in its entirety, which included interest arbitration provisions.

Thus, we find the evidence insufficient to establish that the Respondent made a distinct, specific request of NJAB to include interest arbitration provisions in a new agreement. Rather, it apparently acted essentially only to maintain the status quo regarding this provision.[12] Further, when NJAB significantly limited the scope of the interest arbitration provisions in its award, see footnote 4 supra, the Respondent did not seek further consideration or otherwise protest NJAB's action. In light of the particular facts above, we conclude that there is insufficient evidence of coercion to support an 8(b)(1)(B) finding, i.e., a finding that the Respondent attempted to force the Employer's choice of collective-bargaining representative in future collective-bargaining negotiations through inclusion of the interest arbitration provisions in its submission to NJAB. Accordingly, we reverse the judge's finding of a violation.

ORDER

The complaint is dismissed.

CHAIRMAN STEPHENS, dissenting.

1. Pursuant to the analyses set forth in my dissenting opinions in *Electrical Workers IBEW Local 113 (Collier Electric)*, 296 NLRB 1095 (1989), *Sheet Metal Workers Local 54 (Texas Sheet)*, 297 NLRB 672 (1990), and *Sheet Metal Workers Local 283 (Conditioned Air)*, 297 NLRB 658 (1990), I would find that the Respondent's submission of its dispute with the Employer to NJAB for interest arbitration, and its subsequent Section 301 suit to enforce NJAB's award, violated Section 8(b)(1)(B) of the Act. The collective-bargaining agreement here, and specifically article X, section 8, does not set forth an unequivocal waiver of the 8(b)(1)(B) right of this Employer, an independent signatory of the Association agreement, any more than did the identical contractual language in *Texas Sheet* and *Conditioned Air*, supra, which concerned employers who had timely withdrawn from an employers association.[1]

The fact that the parties here had an 8(f) relationship, and the Employer's reliance on *John Deklewa & Sons, Inc.*, 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir.

positive of the issue in the circumstances of this case. See *Teamsters Local 483 (Ida Cal)*, 289 NLRB 924, 930 (1988).

[9] Although the parties did not engage in negotiations prior to the Respondent's submission to NJAB, it is apparent from the facts of this case that the Respondent stood ready to negotiate a renewal agreement while the Employer declined to meet. Thus, the absence of bargaining prior to the Respondent's submission to NJAB is not indicative of a lack of good faith on the part of the Respondent and therefore does not taint the submission. See *Collier*, supra at 1098. In any event, there is no 8(b)(3) allegation in this case. See *Conditioned Air*, supra at 1097 fn. 9.

[10] Our application of *Collier* makes it unnecessary for us to consider the decisions of the district court and the court of appeals enforcing the NJAB award in terms of collateral estoppel and issue preclusion. A ''reasonable basis in fact and law'' is the standard the Respondent must meet in the circumstances here, and that is what we have found, independently of the courts' decisions.

[11] The two other cases cited by the judge have virtually no bearing on the particular 8(b)(1)(B) violation the judge found. Thus, *Electrical Workers IBEW Local 135 (La Crosse Electrical)*, 271 NLRB 250 (1984), did not involve an alleged 8(b)(1)(B) violation, and *Electrical Workers IBEW Local 532 (Brink Construction)*, 291 NLRB 437 (1988), did not involve matters relating to interest arbitration.

[12] We note, as does our dissenting colleague, that the Respondent's submission included a requested modification of the language in subsection (a) of art. X, sec. 8. As this was just one of several proposed changes on an itemized list submitted by the Respondent affecting various articles of the prospective collective-bargaining agreement, and there is no other evidence establishing the particular circumstances of the proposed change in the interest arbitration mechanism, distinct from the other proposed changes, we conclude that this was no more than one aspect of a routine request for contractual language modifications, quite possibly the very proposals the Respondent would have lawfully presented to the Employer, had its lawful attempt to negotiate a successor contract not been refused.

[1] The Respondent itself highlighted the limited nature of the instant contractual provision: in its submission to NJAB the term ''Local Contractor's Association'' in the first paragraph of subsec. (a) of art. X, sec. 8 was replaced by the term ''employer(s) representative'' in the proposed version, thereby indicating a desire to expand the scope of the rights and obligations under the interest arbitration provisions.

Further, it is apparent that the assertedly binding art. X, sec. 8 language put before both Federal courts in the related Sec. 301 action here was *not* from the agreement the Employer signed in 1984, but in fact was the modified language the Respondent proposed to NJAB for the 1987 renewal agreement. See *Sheet Metal Workers Local 20 v. Baylor Heating*, 688 F.Supp. 462, 465, 467 (S.D.Ind. 1988); cf. fn. 2 of the majority opinion, supra.

1988), cert. denied 109 S.Ct. 222 (1988), to terminate that relationship lawfully when the agreement expired, lends further support to my view that the Employer did not clearly and unmistakably agree to the interest arbitration provisions here. As parties to a prehire agreement authorized by Section 8(f) of the Act, neither the Union nor the Employer had any duty under the Act to bargain with the other following the April 30, 1987 expiration of the 1984–1987 collective-bargaining agreement. Under *Deklewa*, after that date the Union enjoyed no presumption of majority status, and both parties were entitled to repudiate the 8(f) bargaining relationship. The Employer promptly exercised this privilege on May 1, 1987.

Deklewa had not yet issued at the time this collective-bargaining agreement was entered. Hence, I find it difficult to conceive that the Employer clearly and unmistakably waived the right it attempted to exercise here of terminating the bargaining relationship entirely. Furthermore, although art. X, sec. 8, *refers* to renewal negotiations, it nowhere states that parties, however defined, are required to engage in renewal negotiations. It simply describes the procedures that shall apply to controversies arising out of such negotiations. I find it highly unlikely, for example, that if a union disclaimed representation of employees in the area covered by the expiring contract, either this Board or any court would find that the union was nonetheless bound, by virtue of the interest arbitration clause alone, to negotiate new agreements with any area employers that had been bound to the expiring agreement and that wanted a successor agreement or agreements.

In sum, I find that the interest arbitration clause does not apply clearly and unmistakably to this Employer. Further, I see even less of an argument that the interest arbitration clause requires an employer that has properly terminated its 8(f) bargaining relationship under *Deklewa* to engage in negotiations for a successor agreement. Accordingly, I conclude that the Respondent's submission of the dispute to NJAB and its Section 301 suit to enforce the interest arbitration award violated Section 8(b)(1)(B) of the Act.

2. Because I would find a violation of Section 8(b)(1)(B) on the basis of the submission to NJAB, made pursuant to the interest arbitration provision in the 1984 agreement, a fortiori I would find such a violation also in the Respondent's inclusion of an interest arbitration provision in that submission, which would bind the Respondent without its consent to an interest arbitration procedure for any contract following the expiration of the proposed 1987 agreement. But even assuming that the Employer were clearly bound by the interest arbitration clause of the 1984 agreement, I would agree with the judge, for the reasons stated below, that the Respondent violated Section 8(b)(1)(B) by including the interest arbitration clause in its submission to a body on which the Employer had no representation.

Nothing in *Collier Electric* overruled Board precedent holding that it is unlawful to engage in conduct calculated to ''insure'' that an interest arbitration clause ''would be determined by a panel on which [the employer or employer association] was not represented, in patent derogation of its right to bargain collectively through representatives of its own choosing.''[2] As I understand my colleagues' position, they would find no violation because—in the absence of collective bargaining preceding the Respondent's NJAB submission—they do not believe it is clear that the Respondent was insisting, in the absence of the Employer's consent, on the inclusion of an interest arbitration provision in a new agreement. Because I see nothing in the applicable precedents that would require us to treat an absence of prior bargaining on the subject as grounds for immunizing a party's attempt to have an interest arbitration provision imposed on an unwilling party through interest arbitration, I regard the distinction on which they rely as a distinction without a difference.

Neither do I see any defense to a violation under a theory that in seeking enforcement of the NJAB award, the Respondent was merely bringing a ''lawsuit'' with a ''reasonable basis in law and fact,'' whatever its outcome. *Collier Electric*, supra at 1100, citing *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983). At least insofar as the Respondent's suit for enforcement of the award sought inclusion of an interest arbitration clause without the Employer's consent, it lacked any reasonable basis in law. Neither is it material that the Respondent was ultimately unsuccessful in binding the Employer to the provision because the district court and the court of appeals decided, notwithstanding NJAB's conditional inclusion of the provision in the agreement, to read the provision out of the imposed agreement.[3]

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[2] *Sheet Metal Workers Local 59 (Employers Assn.)*, 227 NLRB 520, 521 (1976). See also *Sheet Metal Workers Local 263 (Sheet Metal Contractors)*, 272 NLRB 43 (1984) (finding 8(b)(1)(B) violation in a case in which, after interest arbitration award, union refused to sign any agreement not including the interest arbitration clause). In certain other cases, no violation of Sec. 8(b)(1)(B) has been alleged, but violations of Sec. 8(b)(3) have been found on the theory that the union insisted to impasse on inclusion of interest arbitration clauses in the agreement even prior to the submission to the interest arbitration forum. See, e.g., *NLRB v. Columbus Printing Pressmen*, 543 F.2d 1161, 1166 (5th Cir. 1976); *Electrical Workers IBEW Local 135 (La Crosse Electrical)*, 271 NLRB 250, 251 (1984). See also *Milwaukee Newspaper & Graphic Communications Union Local 23 v. Newspapers, Inc*., 586 F.2d 19 (7th Cir. 1978), cert. denied 440 U.S. 971 (1979) (Sec. 301 action acknowledging the Board's 8(b)(3) precedent and reading this as precluding an effort to have an interest arbitration clause considered in interest arbitration over the other party's objection).

[3] NJAB had conditioned inclusion of interest arbitration on its not being found unlawful by the Board or a court. Both the district court and the court of appeals read it out of the agreement that they enforced because they concluded that it was contrary to the policy of the Act to enforce it against a party's consent and that NJAB therefore lacked authority to include it. See fns. 4 and 6 in the majority opinion, supra.

It is fair to assume that the Respondent knew the contents of its submission to NJAB. The Respondent was also on notice that the Employer would not consent to such a clause, because the Employer, as an 8(f) contractor, took the position that it wanted to end the collective-bargaining relationship totally. Because the Respondent knowingly sought to impose an interest arbitration provision through interest arbitration, I would find that it violated Section 8(b)(1)(B) of the Act.

Ann E. Rybolt, Esq., for the General Counsel.
William R. Groth, Esq. (Fillenwrath Dennerline Groth & Baird), of Indianapolis, Indiana, for the Respondent.
Wm. Michael Schiff, Esq. (Kahn, Dees, Donovan & Kahn), of Evansville, Indiana, for the Charging Party.

DECISION

STEPHEN J. GROSS, Administrative Law Judge. The question is whether Sheet Metal Workers Local Union No. 20 (Local 20) violated Section 8(b)(1)(B) of the National Labor Relations Act (the Act) in its dealings with Baylor Heating and Air Conditioning, Inc. (Baylor).

In August 1984 Baylor voluntarily adopted the collective-bargaining contract then in effect between Local 20 and the Sheet Metal Contractors Association of Evansville, Inc. (the Evansville Contractors Association). The contract was a lawful prehire agreement authorized by Section 8(f) of the Act. Baylor was neither then nor subsequently a member of the Evansville Contractors Association.[1]

The collective-bargaining contract that Baylor adopted expired by its own terms on April 30, 1987. At various times in January and February 1987 Baylor notified Local 20 that it did not intend to be a party to or otherwise be bound by any new collective-bargaining contract with the Union. And on May 1, 1987, Baylor withdrew its recognition of Local 20. Baylor's communications to these effects were timely and unambiguous.

On February 20, 1987—that is, in the midst of the communications between Baylor and Local 20—the Board issued *John Deklewa & Sons*, 282 NLRB 1375 (1987). *Deklewa* holds, among things, that:

> upon the contract's expiration . . . either party may repudiate the 8(f) relationship. The signatory employer will be free, at all times, from any coercive union efforts . . . to compel the negotiation and/or adoption of a successor agreement.[2]

But Local 20 objected to Baylor's refusal to enter into a follow-on agreement. In fact Local 20 filed an unfair labor practice charge against Baylor claiming that Baylor's refusal to bargain about new agreement violated Section 8(a)(5). The Acting Regional Director for Region 25 dismissed the charge, referring to *Deklewa*. When Baylor adhered to its position, Local 20—purportedly acting pursuant to the interest arbitration provisions of the 1984–1987 collective-bargaining contract—asked the National Joint Adjustment Board of the Sheet Metal Industry (NJAB) to resolve its dispute with Baylor, noting that Baylor based its refusal to negotiate with Local 20 on *Deklewa*. The NJAB is comprised of equal numbers of representatives of the Sheet Metal Workers International Association and the Sheet Metal and Air Conditioning Contractors' National Association (SMACCNA). The Evansville Contractors Association is a member of SMACCNA. Baylor is not.

Local 20 sought such action from the NJAB notwithstanding the fact that the interest arbitration provisions at least arguably: (1) applied only to disputes between Local 20 and the Evansville Contractors' Association, not to disputes between the Union and independents like Baylor; (2) applied only if the parties had first attempted to negotiate a follow-on collective-bargaining agreement, which they had not; and (3) were no longer in effect when Local 20 made its request to the NJAB.[3]

Local 20's position before the NJAB was that Baylor should be required to enter into a new collective-bargaining agreement with Local 20 identical in most respects—including its interest arbitration provisions—to the 1984–1987 agreement.

In response, Baylor advised the NJAB that since Baylor's ''collective bargaining relationship with Local Union No. 20 has been terminated and because it has no legal obligation to continue to recognize and bargain with Local Union No. 20, it does not intend to appear or participate in the National Joint Adjustment Board proceedings.'' Baylor provided the NJAB with a copy of the Acting Regional Director's letter dismissing Local 20's unfair labor practice charge.

In June 1987 the NJAB ordered Baylor to execute a 4-year agreement with Local 20. In the language of the NJAB decision:

> Baylor shall execute a four-year agreement effective June 1, 1987 . . . incorporating the same terms and conditions that have been directed by the NJAB to be implemented by the Sheet Metal Contractors Association of Evansville.

When, notwithstanding the NJAB decision, Baylor refused to execute a collective-bargaining contract, Local 20 sought enforcement of the award in the United States District Court for the Southern District of Indiana.

The Matter at Issue Before the Board

On November 10, 1987, Baylor responded to Local 20's District Court action (instituted in October 1987) by filing a charge against Local 20. That charge led, on September 14, 1988, to the issuance of a complaint against Local 20. The heart of the complaint is the allegation that Local 20 violated Section 8(b)(1)(B) by: (1) seeking to bind Baylor ''to a successor collective bargaining agreement by submitting the failure of [Local 20] and [Baylor] to reach a collective-bargaining agreement as a dispute before the . . . NJAB, despite the fact that [Baylor] had already repudiated its 8(f) relationship''; and (2) instituting an action to enforce the NJAB award.[4]

[1] The National Labor Relations Board (the Board) has never certified Local 20 as the exclusive collective-bargaining representative of Baylor's employees, nor has Baylor ever recognized Local 20 as such.

[2] 282 NLRB at 1386.

[3] See the discussion at 10–16 of the General Counsel's brief.

[4] In June 1988 Baylor filed an RM petition covering all of its employees except for clerical employees, professional employees, guards, and supervisors.

Continued

In its answer Local 20 admitted most of the complaint's factual allegations (including all jurisdictional allegations) but denied that it violated the Act in any respect. Because there are no factual disputes, the parties thereafter entered into a series of stipulations that obviated any need for an evidentiary hearing.[5]

The Decisions of the District and Circuit Courts

As just touched on, in October 1987 Local 20 sought enforcement of the NJAB award in the United States District Court for the Southern District of Indiana. Baylor opposed Local 20's action on the merits and, in addition, moved to stay pending action by the Board in this proceeding. But the Court denied the motion to stay and ordered Baylor to implement ''all terms and conditions of [the NJAB] decision retroactive to June 1, 1987.'' *Sheet Metal Workers Local 20 v. Baylor Heating*, 688 F.Supp. 462 (S.D. Ind. 1988), affd. 877 F.2d 547 (7th Cir. 1989). Baylor appealed to the United States Court of Appeals for the Seventh Circuit. The Board intervened for the purpose of seeking a stay of the appeal. The Board's position before the court of appeals, like Baylor's below, was that the court should await action by the Board in this proceeding. In June 1989 the Seventh Circuit denied the stay and affirmed the District Court's judgment. *Sheet Metal Workers Local 20 v. Baylor Heating & Air Conditioning*, 131 LRRM 2838.

Did Local 20's Application to the NJAB Violate Section 8(b)(1)(B)

Focusing on Local 20's objectives, two questions have to be answered. One is whether Local 20 violated Section 8(b)(1)(B) by seeking to have the NJAB compel Baylor to enter into a new collective-bargaining agreement whose terms included interest arbitration provisions. The second is whether Local 20's efforts to have the NJAB compel Baylor to enter into a new agreement violated Section 8(b)(1)(B) even apart from interest arbitration considerations. I will consider the second question first, then return to Local 20's proposal that interest arbitration provisions be included in the new agreement.

Local 20's Efforts to Compel Baylor to enter into a New Agreement

It is reasonably clear that a union violates Section 8(b)(1)(B) if it seeks by coercive means to have an arbitral panel establish the terms of a collective-bargaining agreement, at least where the employer has no representatives on the panel. See *Electrical Workers IBEW Local 532 (Brink Construction)*, 291 NLRB 437 (1988). Since no one contends that Local 20 did anything more coercive to Baylor than to seek relief from the NJAB and the courts, however, the question becomes whether the mere request for arbitral action or for judicial enforcement of an arbitration award may under any circumstances constitute a violation of Section 8(b)(1)(B).[6]

On the one hand, there is the ''congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration.'' *Steelworkers v. Warrior & Gulf Navigation Co*., 363 U.S. 574, 582 (1960). That, of course, suggests that a union's request for action by an arbitrator, standing alone, ought not to be deemed an unfair labor practice. On the other hand, a union's request to an arbitration panel that the panel draft a new multiyear collective-bargaining agreement and impose it on the employer can as a practical matter be coercive indeed, particularly if the membership of the panel is stacked in favor of the union and if, as here, the terms of the collective-bargaining agreement that the union relies on in seeking the award to not specifically apply to the employer.

One possible way of dealing with these competing considerations would be to apply the rationale of *Bill Johnson's*[7] to arbitration proceedings.[8]

But the approach that seems best to me is one in which Local 20's applications to the NJAB and the courts should be deemed violations of Section 8(b)(1)(B) if, but only if, Local 20 could not reasonably have believed that it was entitled to the relief that it sought. (I did not create that standard from whole cloth.) See *Brink Construction*, supra, and *Teamsters Local 483 (Ida Cal Freight)*, 289 NLRB 924 (1988). Both involved the question of whether litigation by unions against employers was coercive, and in each the Board referred to the reasonableness of the union's actions.

The reasonableness of Local 20's position. There are two issues here. One is is whether Local 20 could reasonably have thought that the interest arbitration provisions of the 1984–1987 agreement covered its claim that the NJAB should order Baylor to enter into a new collective-bargaining agreement. The other is whether Local 20 could have reasonably thought that the policies of the Act did not stand in the way of the kind of NJAB award the Union sought.

I will turn first to the interpretation of the interest arbitration provisions. In response to Local 20's action seeking enforcement of the NJAB award, the United States District Court for the Southern District of Indiana considered whether Baylor, by agreeing to the 1984–1987 collective-bargaining agreement, gave its consent to the submission to the NJAB of disagreements with Local 20 about whether there should be a successor agreement and, if so, what its terms should be. The district court concluded that Baylor's adoption of the collective-bargaining agreement did constitute such consent and that the relevant provisions of the agreement were still in effect when Local 20 applied to the NJAB and when the NJAB acted.

As noted earlier, when the district court enforced the NJAB award, Baylor appealed. The Seventh Circuit panel that considered the appeal unanimously affirmed the judg-

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In an election conducted by the Board on November 30, 1988, the employees voted against representation by Local 20. The Regional Director certified the results of the election on December 30, 1988. The effect of this is that even if Baylor and Local 20 had an 8(f) relationship subsequent to April 30, 1987, that relationship ended on November 30, 1988. As the General Counsel puts it, ''the practical impact of the election is that it limits Baylor's potential monetary liability for any alleged breach of contract imposed by the NJAB to the time period between May 1, 1987 and November 30, 1988.'' Br. at 28.

[5] The stipulation are well-crafted and thorough. The parties are to be acknowledged for their willingness to put together a stipulated record that has permitted the parties and the Board to avoid the delay and expense necessarily associated with an evidenciary hearing.

[6] A union may also violate Sec. 8(b)(1)(B) by attempting to use arbitration to gain an unlawful objective. See *Teamsters Local 705 (Emery Air Freight)*, 278 NLRB 1303 (1986), enf. denied 820 F.2d 448 (D.C. Cir. 1987). But again, no one claims that Local 20's actions were intended to gain anything other than the collective-bargaining agreement it asked the NJAB for.

[7] *Bill Johnson's Restaurants*, 461 U.S. 731 (1983).

[8] See *Emery Air Freight*, supra, in which the Board assumed, arguendo, that *Bill Johnson's* does apply to arbitration proceedings.

ment of the district court. In so doing, moreover, the circuit court held that the interest arbitration provisions of the 1984–1987 agreement ''clearly and unmistakably'' covered the dispute between Local 20 and Baylor.[9]

The issue, once again, is not whether the NJAB acted properly, or even whether the courts were correct in enforcing the NJAB award. Rather, it is whether Local 20 could reasonably have thought that its dispute with Baylor was susceptible to arbitration. Given the unanimous view of the the district court and court of appeals judges that Local 20's position was not merely reasonable, but, rather, was correct, I can only conclude that Local 20 had a reasonable basis for believing that its agreement with Baylor authorized the NJAB to consider the Union's request that Baylor be required to enter into a new collective-bargaining agreement.

I recognize that this conclusion amounts to giving limited collateral estoppel effect to the district court and court of appeals decisions. I also recognize that the Board has in the past taken the position that a district court's conclusions do not preclude the Board from arriving at contrary conclusions, even where the parties to the district court case were the respondent and charging party in the Board proceeding and where the district court resolved issues central to the Board proceeding. *Donna-Lee Sportswear Co.*, 281 NLRB 719 fn. 2 (1986), enf. denied 836 F.2d 31 (1st Cir. 1987); *Bay Area Sealers*, 251 NLRB 89, 102–111 (1980); see also *Allbritton Communications*, 271 NLRB 201–202 fn. 4 (1984). But here a circuit court has spoken, as well as a district court. In addition a relatively recent Board decision seems to leave the way open for reconsideration ''of estoppel . . . related to collateral litigation in the Federal courts.'' *Electrical Workers IBEW Local 532 (Brink Construction)*, 291 NLRB 437 (1988). Finally, I cannot immagine a situation in which the Board could find that a union was unreasonable in its belief that interest arbitration provisions of a collective-bargaining agreement applied, if two Federal courts had held that the union's belief was correct, not just reasonable.

The other reasonableness question has to do with the policies that the Board expressed in *Deklewa*. Certainly *Deklewa* can be read as entitling an employer to end its contractual relationship with a union on the termination date of the existing contract. Yet Local 20, relying on the interest arbitration provisions of its contract with Baylor, sought to compel Baylor to enter into a follow-on agreement. The question is whether that effort by Local 20 was an unreasonable one, given *Deklewa*.

That brings us back to the decisions of the district and circuit courts. Both courts considered *Deklewa*. The district court held that *Deklewa* ''did not nullify Baylor's contractual obligations under the interest arbitration clause of the Agreement.'' 688 F.2d at 473. The court of appeals agreed. (131 LRRM at 2845.)

For the reasons expressed earlier, I think that those conclusions of the district and circuit courts preclude me from finding that Local 20 acted unreasonably in seeking to compel Baylor to enter into a follow-on contract. (I am not thereby concluding, of course, that the courts were necessarily correct in the way they applied the National Labor Relations Act and *Deklewa* to the facts at hand.)

[9] 131 LRRM at 2842, quoting *AT&T Technologies v. Communications Workers*, 475 U.S. 643, 649 (1986).

An Interest Arbitration Provision in the Follow-on Contract

In Local 20's submission to the NJAB, the Union asked for a follow-on contract that included the same interest arbitration provisions as the old contract, modified only to make it clearer that the provisions applied to Baylor, Local 20, in other words, not only wanted a follow-on collective-bargaining agreement. In addition the Union wanted to be in a position to compel baylor to enter into yet another contract when the follow-on contract expired.

The NJAB did not grant that part of the relief that Local 20 sought—not fully, at least.[10]

The district court, while enforcing the NJAB award, noted that ''interest arbitration is a non-mandatory subject of bargaining and can only be included in an agreement through mutual consent of the parties.'' 688 F.2d at 473. And the Seventh Circuit specified that the ''arbitrator is . . . prohibited from imposing an interest arbitration clause on the parties against their will.'' 131 LRRM at 2846.

My conclusion is that Local 20 violated Section 8(b)(1)(B) when the Union asked the NJAB to include an interest arbitration provision in a follow-on contract.

First, *Bill Johnson's* does not protect Local 20 since the Union lost at all stages of the litigation regarding inclusion of mandatory interest arbitration provisions in the new contract.

Secondly, the law is altogether clear that a union may not compel an employer to bind itself to an interest arbitration provision over the employer's objection.[11] And that was equally true at the time Local 20 made its submission to the NJAB.[12]

Local 20 thus had no reasonable basis for requesting the relief that it sought. Since Local 20's request to the NJAB in that respect was unreasonable, and since, under the interest arbitration provisions that Local 20 sought, the NJAB—a group in which Baylor had no representation—could purportedly impose on Baylor the terms of a third-generation collective-bargaining agreement, Local 20 violated Section 8(b)(1)(B).

Did Local 20's District Court Suit To Enforce The Arbitration Award Violate Section 8(b)(1)(B)

The Interest Arbitration Provisions of the Contract Drafted by the NJAB

The NJAB decision is ambiguous regarding the interest arbitration provisions of the follow-on contract. But the deci-

[10] The NJAB ordered the interest arbitration provisions of the old contract to be included in the new contract, ''modified to those instances when parties both agree.'' The NJAB's decision also provides: ''It is not the intent of the NJAB to impose any non-mandatory subjects of bargaining upon an unwilling party. In the event the National Labor Relations Board or any court having jurisdiction over the matter determines that any provisions of the agreement is a nonmandatory subject of bargaining to which a party objected, the provision will be deleted, and the parties in that event are directed to enter into negotiations to replace the deleted provision with one that is a mandatory subject of bargaining. In the event the parties cannot agree on a replacement for the non-mandatory provision, the NJAB retains jurisdiction to resolve that issue.''

[11] See, e.g., *Brink Construction*, supra.

[12] See *Sheet Metal Workers Local 263 (Sheet Metal Contractors)*, 272 NLRB 43 (1984); *Electrical Workers IBEW Local 135 (La Cross Electrical)*, 271 NLRB 250 (1984); *Sheet Metal Workers Local 59 (Employers Assn. of Roofers)*, 227 NLRB 520 (1976).

sion certainly can be read as precluding interest arbitration over Baylor's objection. Under the circumstances I cannot conclude that, focusing on the interest arbitration provisions of the NJAB award, Local 20's suit to enforce the NJAB award violated Section 8(b)(1)(B).

The NJAB Award, Generally

As for Local 20's action in the district court to enforce the other facets of the NJAB's award, the district court granted the relief that Local 20 sought, and the of of Appeals affirmed the district court's action. Given the of's actions in favor of Local 20, the Union's suit cannot be said to violate the Act. See *Electrical Workers IBEW Local 532 (Brink Construction)*, supra (referring to *Bill Johnson's Restaurants)*.

REMEDY

The NJAB award, combined with the district court and court of appeals decisions, make it altogether clear that Local 20 may not, over Baylor's objection, utilize the interest arbitration provisions of the current Local 20-Baylor collective-bargaining agreement. Thus no affirmative requirement need be imposed on Local 20 in that respect. But the following recommended Order does require Local 20 to cease and desist from seeking to compel Baylor from binding itself to interest arbitration provisions over Baylor's objection, and requires Local 20 to post notices advising of the Board's action.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The Respondent, Sheet Metal Workers Local Union No. 20 a/w Sheet Metal Workers International Association, AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Restraining or coercing Baylor Heating & Air Conditioning, Inc., in the selection of its representatives for the purposes of collective bargaining, by utilizing the interest arbitration provisions of a collective-bargaining agreement, over Baylor's objection, to request an arbitrator to include interest arbitration provisions in a follow-on contract.

(b) In any like or related manner restraining or coercing Baylor in the selection of its representatives for the purpose of collective bargaining.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at all its locations copies of the attached notice marked ''Appendix.''[14] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notice are not altered, defaced, or covered by any other material.

(b) Sign and mail sufficient copies of the notices to the Regional Director for posting by Baylor Heating and Air Conditioning, Inc., if willing, at all places where notices to employees are customarily posted.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States of of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT restrain or coerce Baylor Heating & Air Conditioning, Inc., in the selection of its representatives for the purpose of collective bargaining, by utilizing the interest arbitration provisions of a collective-bargaining agreement, over Baylor's objection, to request an arbitrator to include interest arbitration provisions in a follow-on contract.

WE WILL NOT in any like or related manner restrain or coerce Baylor in the selection of its representatives for the purposes of collective-bargaining.

SHEET METAL WORKERS LOCAL UNION NO. 20 A/W SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, AFL–CIO